APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun 14, 2001]

No. 00-14543
Non-Argument Calendar

D.C. Docket NO. 00-00287-CR-FAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONNOVAN BULGIN, a.k.a Velton Richardson,
Defendant-Appellant,

Appeal from the United States District. Court for the Southern District of Florida

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(June 14, 2001)

Before ANDERSON, *Chief Judge*, DUBINA and FAY, *Circuit Judges*.

PER CURIAM:

Donnovan Bulgin appeals his convictions and life sentence for conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846, and illegally re-entering the United States after previously being deported, 8 U.S.C. § 1326(a), (b)(2). He argues that the district court erred in denying his motion to suppress the cocaine seized from his vehicle because Grantly Calvin, the individual who consented to the search of the vehicle, did not have authority to consent to the search. Bulgin also contends that the district court erred under

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), by sentencing him based on a quantity of drugs that was not alleged in the indictment and not proven to a jury beyond a reasonable doubt. Finally, he contends that the district court erred under *Apprendi* by sentencing him based on a prior aggravated felony conviction that was not alleged in the indictment.

A district court's denial of a motion to suppress presents a mixed question of law and fact. This court reviews the district court's findings of fact for clear error and the application of law to those facts *de novo*. All facts are construed in the light most favorable to the party that prevailed in the district. court. *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995). "A third party's consent to search an area is valid if he has mutual use of it, with joint access or control of the area for most purposes." *United States v. Brazel*, 102 F.3d 1120, 1148 (11th Cir. 1997), *cert. denied*, 522 U.S. 1060 (1998) (citing *United States, v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974)). However, even if the third party lacks the authority to consent, there is no Fourth Amendment violation if the officer conducting the search had an objectively reasonable, good-faith belief that the consent he obtained was valid. *Id.*

Because Bulgin raised his *Apprendi* arguments at sentencing, we review those issues *de novo*. *United States v. Candelario*, 240 F.3d 1300, 1306 (11th Cir. 2001). Any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. 466, 120 S.Ct. at 2362-63. In light of *Apprendi*, drug quantity constitutes an element of the offense that must be charged in the indictment and proven to a jury beyond a reasonable doubt. *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000). An error under *Apprendi* is harmless "if the record does not contain evidence that

could rationally lead to a contrary finding with respect to drug quantity." *United States v. Nealy,* 232 F.3d 825, 830 (11th Cir. 2000).

An indictment in an illegal re-entry case does not have to allege a defendant's prior aggravated felony conviction in order for a district court to impose an enhanced sentence under 8 U.S.C. § 1326(b). *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). "*Almendarez-Torres* remains the law until the Supreme Court determines that *Almendarez-Torres* is not controlling precedent." *United States v. Guadamuz-Solis*, 232 F.3d 1363 (11th Cir. 2000).

Upon review of the presentence investigation report and the trial and sentencing transcripts, and upon consideration of the parties' briefs, we find no reversible error.

We conclude that the district court did not err in denying Bulgin's motion to suppress the cocaine seized from his car because Calvin bad the apparent authority to grant permission for a search by the law enforcement officer. The district court erred under *Appprendi* by sentencing Bulgin based on a quantity of drugs neither alleged in the indictment nor proven to a jury beyond a reasonable doubt. The district court's error, however, was harmless because no rational jury would have found Bulgin guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine to support Bulgin's life sentence. The evidence was overwhelming in this regard. Finally, the district court did not err by sentencing Bulgin based on a prior aggravated felony conviction that was not alleged in the indictment. The United States Supreme Court's holding in *Almendarez-Torres*, that the allegation of a prior aggravated felony conviction in the indictment is not a prerequisite to an enhanced sentence under 8 U.S.C. § 1326(b), remains binding precedent in this Circuit.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Florida

[Filed Aug 21 , 2000]

UNITED STATES OF AMERICA, v. Donnovan Bulgin a/k/a Velton Richardson	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 1:00CR00287-002 Johnny L. McCray, Jr., Esq./ Edward L. Allen, AUSA Defendant's Attorney

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THE DEFENDANT:

X pleaded guilty to count(s) THREE of the Second Superseding Indictment

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

X was found guilty on count(s) ONE of the Second Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. § 1326 (a),(b)(2)	illegal reentry	03/01/2000	THREE
21 U.S.C. § 846	conspiracy to possess with intent to distribute cocaine	03/03/2000	ONE

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) TWO of the Second Superseding Indictment

☐ Count(s)_____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
279-78-2830

Defendant's Date of Birth:
07/16/1963

Defendant's USM No.: 53777-004

Defendant's Residence Address:

F.D.C.
33 NE 4th Street
Miami FL 33128

Defendant's Mailing Address:

F.D.C.
33 NE 4th Street
Miami FL 33128

08/17/2000
Date of Imposition of Judgment

/s/ Federico A. Moreno
Signature of Judicial Officer
FEDERICO A. MORENO
United States District Judge
August 18, 2000
Date

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

The term of Life imprisonment is as to count ONE. It is further Ordered that the defendant shall be imprisoned for a term of 20 years as to count THREE to run concurrent with term imposed in count ONE.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:_____

_____

Defendant delivered on _____to_____at____,with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

_____

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 year(s). See Additional Supervised Release Terms-Page 4

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) he defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

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ADDITIONAL SUPERVISED RELEASE TERMS

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for deportation proceedings consistent with the Immigration and Nationality Act.

If deported, the defendant shall not reenter the United States without the express permission of the United States Attorney General. The term of supervision shall be non-reporting if the defendant resides outside the United States. If the defendant should reenter the United States within the term of supervised release, the defendant is to report to the nearest United States Probation Office within 72 hours of his or her arrival.

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

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SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S.

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____(*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States:

492 Cypress Green Circle in Wellington, Florida.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

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☐ The court adopts the factual findings and guideline application in the presentence report

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Additional Factual Finding and Guideline Application Exceptions-page 8

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: III

Imprisonment Range: Life

Supervised Release Range: 5years

Fine Range: $ 20,000.00 to $ 8,000,000.00

X Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstance of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any of some portion of an restitution order in the forseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is with the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range

☐ upon motion of the government, as result of defendant's substantial assistance.

☐ for the following specific reason(s):

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

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ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The Court ruled that the obstruction adjustment did not apply and he should receive acceptance of responsibility.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 00-287-CR-MORENO(s)(s)

21 U.S.C. 846
21 U.S.C. 841(a)(1)
21 U.S.C. 853
18 U.S.C. 2
8 U.S.C. 1326(a) and (b)(2).

UNITED STATES OF AMERICA,
Plaintiff,

v.

DONNOVAN BULGIN, a/k/a VELTON RICHARDSON,
Defendant.

SUPERCEDING INDICTMENT

The Grand Jury charges that:

COUNT I

From in or about 1995, to on or about March 3, 2000, the exact dates being unknown to the Grand Jury, at Dade County, Broward County, and Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

did knowingly and intentionally combine, conspire, confederate and agree with other persons, known and unknown to the grand jury, to possess with intent to distribute a Schedule II

controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about March 3, 2000, at Palm Beach County, and Broward County, in the Southern District of Florida, and elsewhere, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about March 1, 2000, in Palm Beach County, in the Southern District of Florida, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

an alien, having previously been deported from the United States on or about March 15, 1994, was found to be in the United States, knowingly and unlawfully, without the Attorney General having expressly consented to such alien's reapplying for admission to the United States, in violation of Title 8, United States Code, Sections 1326(a), (b)(2).

FORFEITURE COUNT

Upon conviction of the felony offenses alleged in Counts I and II of this Indictment, which is realleged herein, as set forth in full, the United States is entitled to forfeiture of, and the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

shall forfeit to the United states any and all property constituting or derived from any proceeds the defendant DONNOVAN BULGIN, a/k/a VELTON RICHARDSON, obtained, directly or indirectly as a result of said violations and any and all property used or intended to be used in any manner or part to commit or facilitate the commission of the violations alleged in Counts I and II of this Indictment, including but not limited to the following:

1. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 492 Cypress Green Circle, Wellington, Palm Beach County, Florida 33414, and more particularly described as:

Lot 139, of Bink's Forrest of the Landings at Wellington, P.U.D., Plat 2, according to the Plat therein, as recorded in Plat Book 70, at Pages 162 to 175, inclusive, of the Public Records of Palm Beach County, Florida.

2. If any of the above-described property, as a result of any act or omission of the defendant:

(a) cannot be located upon the exercise of due diligence; iii

(b) has been transferred, sold to, or otherwise deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty, it is the intention of the United States to seek forfeiture of

any other property of said defendant up to the value of the above-described forfeitable property pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

/s/ Thomas E. Scott
THOMAS E. SCOTT
UNITED STATES ATTORNEY

/s/ Edward L. Allen
EDWARD L. ALLEN
ASSISTANT UNITED STATES ATTORNEY